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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ERIC KLOPMAN-BAERSELMAN, as
12 Personal Representative for the Estate of
13 RUDIE KLOPMAN-BAERSELMAN,
14 deceased,

15 Plaintiff,

16 v.

17 AIR & LIQUID SYSTEMS
18 CORPORATION, et al.,

19 Defendants.

CASE 3:18-cv-05536-RJB

ORDER ON PLAINTIFF'S
MOTION FOR SANCTIONS
AGAINST O'REILLY
AUTOMOTIVE STORES, INC.

20 THIS MATTER comes before the Court on Plaintiff's Motion for Sanctions Against
21 O'Reilly Automotive Stores, Inc. ("O'Reilly"; elsewhere referred to as "CSK"). Dkt. 407. The
22 Court has considered the motion, all materials filed in support of and in opposition to the motion,
23 and the remainder of the record herein, and it is fully advised. Oral argument is unnecessary to
24 decide the motion.

For the reasons set forth below, Plaintiff's motion for sanctions should be granted, in
part, and denied, in part.

1 **I. PROCEDURAL HISTORY & BACKGROUND**

2 **1. PROCEDURAL HISTORY**

3 Plaintiff filed the instant motion requesting sanctions against O'Reilly for (1) failing to
4 provide requested written discovery information and (2) sending a corporate representative that
5 was unprepared for a FRCP 30(b)(6) deposition. Dkt. 407. O'Reilly filed a response in
6 opposition to Plaintiff's Motion for Sanctions. Dkt. 430. Plaintiff filed a reply in support of its
7 motion for sanctions. Dkt. 461.

8 **2. BACKGROUND**

9 a. Written Discovery Requests and Responses

10 The instant motion relates, in part, to a prior discovery dispute on which the Court has
11 already ruled (Dkt. 210; "Order"). In the Order, the Court ruled that "at least four, and possibly
12 many more, of O'Reilly's responses do not sufficiently answer Plaintiff's interrogatories and
13 requests for production." Dkt. 210. The Court further observed that many of O'Reilly's
14 responses claiming to lack requested information were "incredible and hard to believe." Dkt.
15 210, at 5. One of the requests for admission ("RFA") at issue was RFA 10, which stated, "Please
16 admit YOU sold Bendix brakes." Dkt. 408, at 113. O'Reilly's objection and response provided,
17 in part, "O'Reilly ... did not acquire CSK Auto Corporation until July 11, 2008. Accordingly,
18 CSK does not have historical information regarding product sales before that time and is unable
19 to admit or deny this request." Dkt. 408, at 113. In its order, the Court discussed only four
20 individual responses' inadequacies (Interrogatories 1-2 and RFAs 46 and 50) and did not
21 specifically discuss other possibly insufficient responses. Dkt. 210. The Court cautioned
22 O'Reilly to provide all information requested within the scope of FRCP 26 and ordered O'Reilly
23 to file adequate answers to Plaintiff's written discovery requests by May 13, 2019. Dkt. 210, at
24

1 10. It appears that O'Reilly served supplemental responses only as to the four insufficient
2 responses specifically discussed by the Court. Dkt. 408, at 103.

3 On September 11, 2019, Plaintiff deposed O'Reilly's corporate representative, James F.
4 Murray ("Mr. Murray"). Dkt. 408, at 56. Mr. Murray provided testimony regarding, among other
5 things, Bendix brakes sales during the mid-1980s. Dkt. 408, at 70–71. Mr. Murray testified that
6 Bendix brakes were a stocked product sold by Shucks or CSK during approximately the mid-
7 1980s and that Bendix brakes were a high-end line of brakes sold during that time. Dkt. 408, at
8 70–71. When Mr. Murray was asked whether "what you'd told us about Bendix is vastly
9 different than what the company said in written responses," he responded, "It looks like it, sure."
10 Dkt. 408, at 75.

11 Plaintiff alleges that another example of O'Reilly's failure to disclose can be found in
12 connection with RFA 90, which asks, "Please admit YOU sold Fel Pro gaskets." Dkt. 408, at
13 136. O'Reilly's response referred Plaintiff to its answer concerning Bendix brakes stating that it
14 was unable to admit or deny the request. Dkt. 408, at 113, 136. Plaintiff argues that O'Reilly's
15 purported inability to admit or deny the request was belied by the deposition of Mr. Murray, who
16 testified, in part, "We still [sell Fel Pro gaskets], to this day." Dkt. 408, at 65. Dkt. 407, at 7–8.

17 Plaintiff contends that Mr. Murray's deposition and other evidence exposed that O'Reilly
18 failed to sufficiently respond to several discovery matters, including requests related to O'Reilly
19 and Bendix brakes (Interrogatories 3, 8 and RFAs 10–22, 112–116), Fel Pro gaskets
20 (Interrogatories 3, 10 and RFAs 90–95), Partex brakes (Interrogatories 3, 9 and RFAs 30–36),
21 Raybestos brakes (Interrogatories 3, 14–16 and RFAs 37–43), EIS brakes (RFAs 44–50), and
22 Wagner brakes (RFAs 58–64). Dkt. 407, at 7–10.

1 O'Reilly writes in its oppositional response, "In that deposition, Mr. Murray provided
2 testimony that included information that would be pertinent to some of plaintiff's discovery
3 requests.[]As a result, defendant submitted amended discovery answers on September 23, 2019."
4 Dkt. 430, at 2. Dkt. 430-1 (providing O'Reilly's Second Amended Answers, filed after the
5 deposition of Mr. Murray). O'Reilly contends that, "[g]iven the broad extent of the discovery
6 sought by plaintiff, parties should be encouraged to provide supplemental discovery responses as
7 information comes to light, not sanctioned." Dkt. 430, at 3. As to RFA 10, O'Reilly amended its
8 answer to provide, in part, "CSK admits that, upon information and belief, as supported by
9 certain deposition testimony, Schuck's may have sold Bendix brakes for some period of time that
10 cannot presently be identified." Dkt. 430-1, at 42. As to RFA 90, O'Reilly amended its answer to
11 provide, in part, "CSK admits that, upon information and belief, as supported by certain
12 deposition testimony, Schuck's may have sold Fel Pro gaskets for some period of time that
13 cannot presently be identified." Dkt. 430-1, at 66.

14 Plaintiff argues that O'Reilly's amendments came only "after it got caught perpetrating a
15 fraud on the Court" and that "Defendant has had at its disposal answers to much of the discovery
16 it had previously declined to answer." Dkt. 461, at 1-2.

17 b. Corporate Representative Preparation

18 Plaintiff contends that Mr. Murray was unprepared to testify at deposition. Dkt. 407, at
19 10. O'Reilly argues that Mr. Murray testified to the best of his ability and that "[O'Reilly] is not
20 aware of a company representative who would be more familiar than Mr. Murray with historical
21 sales information regarding CSK Auto in the State of Washington." Dkt. 430, at 2.

22 c. Plaintiff's Request for Sanctions

23 Plaintiff requests sanctions as follows:
24

- (1) deeming the brakes, clutches, and gaskets purchased by Rudie Klopman-Baerselman from Schuck's to be asbestos-containing;
- (2) deeming that Schuck's knew asbestos was hazardous at the time Rudie Klopman-Baerselman purchased the asbestos-containing products from Schuck's;
- (3) instructing the jury that Schuck's made untruthful statements under oath in this case, which the jury can consider in assessing Schuck's credibility;
- (4) deeming Rudie's exposure to asbestos from the Schuck's brakes, clutches, and gaskets he purchased a substantial factor in increasing his risk of developing mesothelioma;
- (5) deeming admitted the requests for admission; and
- (6) issuing an order that O'Reilly pay to Plaintiff the sum of \$19,052.39 as the reasonable cost and attorney fees incurred by the moving party in connection with this proceeding within ten days of the Court's order.

Dkt. 407, at 17.

II. DISCUSSION

1. STANDARDS ON DISCOVERY AND SANCTIONS

FRCP 26(g)(1) requires a litigant to make a reasonable inquiry into the factual basis for its response to a discovery request:

Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

- 1
- 2 (i) consistent with these rules and warranted by existing law or
- 3 by a nonfrivolous argument for extending, modifying, or
- 4 reversing existing law, or for establishing new law;
- 5
- 6 (ii) not interposed for any improper purpose, such as to harass,
- 7 cause unnecessary delay, or needlessly increase the cost of
- 8 litigation; and
- 9
- 10 (iii) neither unreasonable nor unduly burdensome or expensive,
- 11 considering the needs of the case, prior discovery in the
- 12 case, the amount in controversy, and the importance of the
- 13 issues at stake in the action.

14 FRCP 26(g)(3) provides that:

15 If a certification violates this rule without substantial justification,

16 the court, on motion or on its own, must impose an appropriate

17 sanction on the signer, the party on whose behalf the signer was

18 acting, or both. The sanction may include an order to pay the

19 reasonable expenses, including attorney's fees, caused by the

20 violation.

21 FRCP 26(e)(1) provides that:

22 A party who has made a disclosure under Rule 26(a)—or who has

23 responded to an interrogatory, request for production, or request

24 for admission—must supplement or correct its disclosure or

response:

(A) in a timely manner if the party learns that in some material

respect the disclosure or response is incomplete or incorrect,

and if the additional or corrective information has not

otherwise been made known to the other parties during the

discovery process or in writing; or

(B) as ordered by the court.

FRCP 37(a)(1) provides that, in part:

On notice to other parties and all affected persons, a party may

move for an order compelling disclosure or discovery. The motion

must include a certification that the movant has in good faith

conferred or attempted to confer with the person or party failing to

make disclosure or discovery in an effort to obtain it without court

action.

1 FRCP 37(a)(3)(A)–(B) provides:

2 (A) *To Compel Disclosure*. If a party fails to make a disclosure
3 required by Rule 26(a), any other party may move to compel
4 disclosure and for appropriate sanctions.

5 (B) *To Compel a Discovery Response*. A Party seeking discovery
6 may move for an order compelling an answer, designation,
7 production, or inspection.

8 Courts are given broad discretion to control discovery under FRCP 37, including
9 “particularly wide latitude ... to issue sanctions under FRCP 37(c)(1)[.]” *Ollier v. Sweetwater*
10 *Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir. 2014) (quoting *Yeti by Molly, Ltd. v. Deckers*
11 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

12 **2. MEET AND CONFER CERTIFICATION**

13 Plaintiff certifies that the parties met and conferred prior to filing the instant motion. Dkt.
14 407, at 2. Therefore, the instant motion satisfies the applicable meet and confer requirements.

15 **3. WRITTEN DISCOVERY RESPONSES**

16 It does not appear that O’Reilly made a reasonable inquiry into the factual basis for its
17 responses to Plaintiff’s written discovery requests. In its Order, the Court cautioned O’Reilly
18 that its purported inability to provide almost any information concerning Shucks’ business and
19 sales in Washington was “incredible and hard to believe.” Dkt. 210, at 5. Despite the Court’s
20 warning that “at least four, and possibly many more, of O’Reilly’s responses d[id] not
21 sufficiently answer Plaintiff’s interrogatories and requests for production,” it appears that
22 O’Reilly provided supplemental responses to only those four matters specifically identified by
23 the Court as “clearly insufficient.” Dkt. 210, at 5. Dkt. 408, at 103. Yet O’Reilly’s amended
24 answers were unresponsive regarding several matters to which Mr. Murray apparently had
substantial knowledge, including the sale of Bendix brakes and Fel Pro gaskets—a product

1 apparently still sold by O'Reilly. This suggests strongly that O'Reilly made little effort, if any,
2 to locate information pertinent to several of Plaintiff's discovery requests.

3 O'Reilly writes, "Rather than recognizing that defendant amended its responses in good
4 faith in accordance with its duty to supplement, plaintiff evidently takes the position that
5 O'Reilly is obligated to canvas all of its employees to see whether any of them ... have
6 information as to the nature of CSK Auto's historical sales practices." Dkt. 430, at 2. O'Reilly's
7 argument is exaggerated and unpersuasive, and it fails to explain how O'Reilly could have made
8 a reasonable inquiry into the factual basis of its responses without at least identifying related
9 products that are apparently still sold by O'Reilly, such as Fel Pro gaskets. O'Reilly's duty to
10 reasonably inquire as to the factual basis of its responses is not excused by its attempts to comply
11 with its duty to supplement. Moreover, inconsistent with Mr. Murray's testimony, O'Reilly's
12 Second Amended Responses still fail to state whether O'Reilly presently sells Fel Pro gaskets.
13 *See* Dkt. 430-1, at 66.

14 Therefore, O'Reilly's responses to Plaintiff's written discovery requests were insufficient
15 under FRCP 26. An appropriate "sanction may include an order to pay the reasonable expenses,
16 including attorney's fees, caused by the violation." Fed. R. Civ. P. 26(g)(3).

17 **4. PREPARATION OF O'REILLY'S CORPORATE REPRESENTATIVE, MR.**
18 **MURRAY**

19 The Court has reviewed the transcript of Mr. Murray's deposition and it appears that he
20 was prepared to testify as to matters known or reasonably available to the organization, as
21 required by FRCP 30(b)(6). The discovery in this case is complex and voluminous, and despite
22 Plaintiff's lengthy critique of Mr. Murray's testimony and preparation efforts, Mr. Murray
23 appeared reasonably knowledgeable and prepared.
24

1 Therefore, the Court concludes that O'Reilly's corporate representative, Mr. Murray, was
2 sufficiently prepared under FRCP 30(b)(6) and O'Reilly should not be sanctioned for his
3 deposition preparation efforts.

4 **5. CONCLUSION**

5 O'Reilly's responses to Plaintiff's written discovery requests were insufficient under
6 FRCP 26. However, O'Reilly's corporate representative, Mr. Murray, was sufficiently prepared
7 under FRCP 30(b)(6), and O'Reilly should not be sanctioned for his deposition preparation
8 efforts. Therefore, the Court should grant Plaintiff's motion as to its request for sanctions
9 regarding written discovery, and deny Plaintiff's motion as to its request for sanctions regarding
10 the preparation of O'Reilly's corporate representative.

11 A lesser sanction than that requested by Plaintiff is appropriate. The Court should
12 sanction O'Reilly for \$1,000.00 and order it to review its Second Amended Responses to
13 Plaintiff's First Interrogatories and Requests for Production and First Set of Requests for
14 Admission. O'Reilly should conduct a reasonable inquiry into the factual basis of its responses
15 and file a third amended response no later than November 15, 2019.

16 Discovery in this case has been difficult. Despite extraordinary Court assistance, the
17 parties have frequently been unable to manage the discovery process. Here, O'Reilly's discovery
18 responses and "vastly different" corporate representative deposition statements are yet another
19 example of discovery mismanagement—and a serious one. Dkt. 408, at 75.

20 **III. ORDER**

21 Therefore, it is hereby **ORDERED** that:

- 22 • Plaintiff's Motion for Sanctions Against O'Reilly Automotive Stores, Inc. (Dkt.
23 407) is **GRANTED, in part, and DENIED, in part**, as follows:

